



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

3/25/2022 8:34:07 AM

Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Tax TITLE-SERIES: 110-13DD
RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: 110-13DD Farm-To-Food Bank Tax Credit

PRIMARY CONTACT

NAME: MARK S MORTON
ADDRESS: PO Box 1005
CHARLESTON, WV 25324
EMAIL: taxlegal@wv.gov
PHONE NUMBER: 304-558-5330

CITE STATUTORY AUTHORITY: W. Va. Code §11 13DD-5

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

Tax is required to promulgate rules and Agriculture has chosen to do so through Tax's rule.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? Yes

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? Yes

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD:

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED:

COMMENTS RECEIVED:

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING:

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

This rule will provide guidance in the administration of this credit by providing additional definitions, establishing the procedure for claiming credit, addressing confidentiality requirements, and incorporating certain general administrative procedures.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

This new rule sets forth guidance on the administration and use of the tax credit authorized in W.VA. CODE §§ 11-13DD-1 et seq., by the Legislature in S.B. 25, which completed legislative action on April 8, 2017.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

According to our interpretation, passage of this bill would result in an annual revenue decrease of less than \$10,000.

Additional administrative costs incurred by the State Tax Department would be \$28,000 in FY2019 and \$15,000 per year in fiscal years thereafter.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2022 Increase/Decrease (use "-")	2023 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	15000
Personal Services	0	0	15000
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0		0
Other	0		0
2. Estimated Total Revenues	0	0	10000

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

According to our interpretation, this credit would result in an annual revenue decrease of less than \$10,000. This estimate is derived from actual experience in other states with a similar tax preference. The amount of this proposed tax credit is equal to ten percent of the value of the donated edible agricultural products by farmers, but does not exceed \$2,500 during a taxable year or the total Personal Income Tax or Corporation Net Income Tax liability, whichever is less, in the year the donation is made. If the amount of the credit exceeds the taxpayers Personal or Corporation Net Income Tax liability for the taxable year, the amount which exceeds the tax liability may be carried over up to four taxable years and applied as a credit against the tax liability of the taxpayer.

Additional administrative costs incurred by the State Tax Department would be \$28,000 in FY2019 and \$15,000 per year in fiscal years thereafter.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

**TITLE 110
LEGISLATIVE RULE
STATE TAX DEPARTMENT**

**SERIES 13DD
FARM-TO-FOOD BANK TAX CREDIT**

§110-13DD-1. General.

1.1. Scope. -- This legislative rule sets forth the procedures and requirements for the State Tax Department's administration of the farm-to-food bank tax credit that is established by W. Va. Code §11-13DD-1, *et seq.*

1.2. Authority. -- W. Va. Code §11-13DD-5.

1.3. Technical Amendment Filed. -- ~~July 13, 2021.~~

1.4. Effective Date. -- ~~March 23, 2018.~~

1.5. Sunset Provision. -- This rule shall terminate and have no further force or effect on August 1, ~~2023~~2028.

1.6. Applicability. -- The farm-to-food bank tax credit is available to qualified donors who make eligible and certified donations after December 31, 2017.

§110-13DD-2. Definitions.

2.1. "Agriculture Commissioner" means the Commissioner of the West Virginia Department of Agriculture.

2.2. "Agriculture Department" means the West Virginia Department of Agriculture.

2.3. "Credit" means the farm-to-food bank tax credit authorized by W. Va. Code §11-13DD-1, *et seq.*

2.4. "Donation" means eligible agricultural products provided free of charge to a non-profit food program.

2.5. "Farming taxpayer" means a West Virginia taxpayer responsible for, and deriving income of, at least \$1,000 from growing fruits, vegetables or other edible agricultural products or from raising beef, poultry, pork, fish or other edible agricultural products.

2.6. "Nonprofit food program" means a surplus food collection and distribution program operated and established to collect donated food for redistribution to persons in need and is recognized as exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code.

2.7. "Qualified donor" means any donor whose donation(s) has been certified by the West Virginia Department of Agriculture, pursuant to §11-13DD-4, and who is otherwise eligible to claim the farm-to-food bank tax credit.

2.8. "Tax Department" means the West Virginia State Tax Department.

2.9. "Tax Commissioner" means the West Virginia State Tax Commissioner.

§110-13DD-3. Tax Credit Authorized; Effective Date; Administration.

3.1. W. Va. Code §11-13DD-1, *et seq.*, authorizes a tax credit for farming taxpayers making donations of edible agricultural products to nonprofit food programs on or after January 1, 2018.

3.2. The farm-to-food bank tax credit can be applied against taxes imposed by W. Va. Code §11-21-1, *et seq.* and §11-24-1, *et seq.*

3.3. The farm-to-food bank tax credit cannot be used to offset any tax that is not named in subsection 3.2.

3.4. The taxes imposed by W. Va. Code §11-21-1, *et seq.* and §11-24-1, *et seq.* are administered in accordance with the provisions of W. Va. Code §11-10-1, *et seq.*, pursuant to W. Va. Code §11-10-3. Because the Office of Tax Appeals has jurisdiction to hear and determine appeals from decisions or orders of the Tax Commissioner denying refunds or credits for all taxes administered in accordance with the provisions of W. Va. Code §11-10-1, *et seq.*, the Office of Tax Appeals has jurisdiction to hear and determine appeals from decisions or orders of the Tax Commissioner denying credits with respect to the farm-to-food bank tax credit. The West Virginia Office of Tax Appeals lacks jurisdiction to hear appeals arising from actions of the Department of Agriculture.

§110-13DD-4. Procedure for Certification.

4.1. In addition to the definition set forth in W. Va. Code §11-13DD-2(3), "edible agricultural product" shall include the following:

4.1.a. Fruits and vegetables;

4.1.b. Meats, including fish;

4.1.c. Grains; and

4.1.d. Dairy products.

4.2. A farming taxpayer who wishes to make an eligible donation must take the donated product(s) to a qualifying nonprofit food program and present the receipt form promulgated by the Department of Agriculture, pursuant to W. Va. Code §11-13DD-4, for completion.

4.3. After the receipt form has been completed by the nonprofit food program, the farming taxpayer shall submit the receipt form to the Department of Agriculture for certification.

4.4. After the Department of Agriculture has reviewed the receipt form and chosen to either make certification or deny certification, if certification has been granted, the farming taxpayer shall maintain the certified receipt form with his or her records.

4.5. The donation shall be valued in accordance with the provisions of W. Va. Code §11-13DD-4. If the value of the donation cannot be determined in accordance with the provisions of W. Va. Code §11-13DD-4, the taxpayer shall determine fair market value based upon West Virginia market data.

§110-13DD-5. Application for and Amount of Tax Credit.

5.1. At the conclusion of the tax year during which the farming taxpayer has made eligible donations that have been certified by the Department of Agriculture, the farming taxpayer may apply to the Tax Commissioner to receive the farm-to-food bank tax credit.

5.1.a. The amount of the credit shall be based upon the certification provided by the Department of Agriculture, although the limitations set forth in W. Va. Code §11-13DD-3 shall apply.

5.1.b. The farming taxpayer shall make application for the farm-to-food bank tax credit on a form approved by the Tax Commissioner, which shall be filed at the same time as either the Personal Income Tax return or Corporate Net Income Tax return, depending upon which of these two taxes is the tax for which the credit is being requested.

§110-13DD-6. Limitations on Tax Credit.

6.1. Beginning in the year in which the farm-to-food bank tax credit is claimed, the following rules shall apply:

6.1.a. The farming taxpayer shall use the credit to offset its payment of or liability for either Personal Income Tax or Corporate Net Income Tax for the tax year during which the eligible, certified donation was made.

6.1.b. If any credit remains after application during the first year, the remaining credit may be carried over for each of the next four tax years unless it is sooner used.

6.1.c. The credit is not refundable, it may not be carried back to prior tax years and it may not be transferred.

6.1.d. Electing small business corporations, limited liability companies, partnerships and other unincorporated organizations shall allocate the credit allowed by W. Va. Code §11-13DD-1, *et seq.* among its members in the same manner as profits and losses are allocated in the taxable year.

6.1.e. If a small business corporation, limited liability company, partnership or other unincorporated organization claims the credit, the cap established by W. Va. Code §11-13DD-3 shall apply at the entity level, and each individual taxpayer claiming the credit must claim it in the manner described in subdivision 6.1.d.

6.2. Forfeiture of Credit. The farm-to-food bank tax credit shall be forfeited by the farming taxpayer in the following circumstances:

6.2.a. If the farming taxpayer becomes no longer subject to the taxing authority of the State of West Virginia. This includes, but is not limited to, a change in the tax attributes of the taxpayer, such as, for example, changing from an S corporation to a C corporation.

6.2.b. If the credit is not depleted in the first tax year and carry-over credit is not completely used

during the subsequent four tax years.

6.2.c. If the Tax Commissioner receives notification from the Department of Agriculture that the certification was issued in error, including errors stemming from the limitations imposed by W. Va. Code §11-13DD-3. A tax liability may result for any tax year in which the credit has been claimed if this occurs.

6.2.d. If the Tax Commissioner becomes aware that the limitations imposed by W. Va. Code §§11-13DD-3(b) or (d) have been exceeded. A tax liability may result for any tax year in which the credits claimed exceed the limitations specified in W. Va. Code § 11-13DD-3.

§110-13DD-7. General Procedure and Administration.

7.1. Requirements to Claim the Tax Credit. To claim a tax credit, the farming taxpayer shall comply with the provisions of W. Va. Code §11-13DD-1, *et seq.* and this rule, and shall timely provide complete and accurate forms, returns, schedules and other information required or requested by the Agriculture Commissioner or Tax Commissioner.

7.2. Applicability of Other Laws. Application of this credit and eligibility for this credit shall not affect or abrogate application of the provisions of any portion of chapter eleven, or any other section, of the West Virginia Code.

7.3. Maintenance of Records. A farming taxpayer shall maintain the records required to verify the validity of its eligibility for the tax credit and the accuracy of the amount of tax credit claimed. The receipt form returned to the farming taxpayer by the Department of Agriculture shall be considered persuasive evidence of eligibility for this credit.

7.4. The farming taxpayer who claims the farm-to-food bank tax credit remains subject to audit by the Tax Commissioner or his or her designee.